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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the legislative review procedures set forth in Section 202(c) of the Natural Gas Policy Act of 1978 constitute "necessary and proper" means of executing the legislative power of Congress over commerce in natural gas, and are consistent with the letter and spirit of other provisions of the Constitution.

2. Whether Section 202(c) of the Natural Gas Policy Act of 1978 is severable from other provisions of Section 202.

3. Whether a federal court, having invalidated the sole provision of a statute by which an administrative rule-proposal can become effective, has power to declare the rule-proposal effective by its own fiat.

4. Whether private parties have Article III standing to challenge the constitutionality of Section 202(c), pursuant to which the House of Representatives disapproved by resolution a proposed administrative rule that might have benefited the private parties.

5. Whether, under Article III, an inter-Branch constitutional controversy can be resolved by a federal court in a proceeding where the contending Branches appear only as *amici curiae*.

6. Whether a controversy over the execution of the Necessary and Proper Clause constitutes a nonjusticiable political question.

7. Whether a judical review proceeding is moot where the administrative rule under review has never become effective as a matter of law.

PARTIES BELOW

There were three petitioners in the proceedings below: Consumers Energy Council of America, Consumer Federation of America, and Public Citizen.

The sole party respondent was the Federal Energy Regulatory Commission.

The United States participated as *amicus curiae* in support of the petitioners.

There were seven intervenors in support of the respondent: Petrochemical Energy Group, Process Gas Consumers Group, American Gas Association, Georgia Industrial Gas Group, American Iron and Steel Institute, Interstate Natural Gas Association of America, and United Distribution Companies.

The United States House of Representatives and the United States Senate participated as *amici curiae* in support of the constitutionality of Section 202(c) of the Natural Gas Policy Act of 1978.

After judgment, the United States, the House and the Senate were granted leave to intervene by the court below.

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UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The United States House of Representatives, acting through the Speaker of the House pursuant to H. Res. 49, 97th Cong., 1st Sess., 127 Cong. Rec. H260 (daily ed., Jan. 29, 1981), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on January 29, 1982, in proceedings there captioned *Consumer Energy Council of America, et al.* v. *Federal Energy Regulatory Commission*, Nos. 80–2184, 80–2312.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 673 F.2d 425. The opinion is reproduced, as originally issued, in the appendix to the jurisdictional statement filed in a related case before this

Court, No. 81–2008, by the Process Gas Consumers Group, et al. App. 1a–104a.[1]

On May 6, 1980, the Federal Energy Regulatory Commission issued Order No. 80, which contains the rule-proposal in question. Order No. 80 is reported at 45 Fed. Reg. 31622, and is reprinted herein at App. 123a–195a.

On August 1, 1980, the Commission issued an order denying rehearing and revoking the rule-proposal contained in Order No. 80. That order is reported at 45 Fed. Reg. 54741, and is reprinted herein at App. 196a–203a.

On October 2, 1980, the Commission issued an order denying a second petition for rehearing, addressed to the revocation portion of the order of August 1, 1980. The October 2 order is reported at 45 Fed. Reg. 71780, and is reprinted herein at App. 204a–206a.

JURISDICTION

Judicial review proceedings were instituted in the District of Columbia Circuit by the respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen ("CECA").[2] Jurisdiction was grounded on Section 506(a)(4) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3416(a)(4).

On January 29, 1982, the District of Columbia Circuit entered a judgment which (a) adjudged "that the one-house veto provision in section 202(c) of the NGPA is unconstitutional," (b) reversed "the orders of the Federal Energy Regulatory Commission under review," and (c) remanded the cases "to the Commission for further proceedings consistent with the opinion of this Court filed herein this date." App. 208a–209a.

On March 2, 1982, the District of Columbia Circuit entered an order granting the timely "motions of the United States

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[1] References herein to "App." are to the appendix filed jointly by all aggrieved parties in the various proceedings now before this Court growing out of the decision below. This 231-page appendix accompanied the jurisdictional statement filed on April 29, 1982, by the Process Gas Consumers Group, et al., No. 81–2008.

References herein to "C.A.App." are to the appendix filed by the parties in the proceedings before the District of Columbia Circuit.

[2] These three non-profit organizations, respondents before this Court, are referred to collectively herein as "CECA."

House of Representatives, the United States Senate, and the United States for leave to intervene." App. 105a. All three entities had sought intervention solely to acquire standing to pursue their interests as parties before this Court, having appeared before the Circuit only as *amici curiae*.

On March 10, 1982, the District of Columbia Circuit denied a timely petition for rehearing and a suggestion for rehearing *en banc*, filed by the American Gas Association. The Association had been an intervenor in the proceedings below; it filed a timely notice of appeal on March 26, 1982, pursuant to 28 U.S.C. § 1252, and docketed the appeal in this Court on May 24, 1982, No. 81–2171. Three other intervening groups have docketed appeals in this Court, pursuant to 28 U.S.C. § 1252. See Nos. 81–2008, 81–2020, 81–2151. These intervenors also secured a stay of the mandate of the District of Columbia Circuit.

On May 26, 1982, the Chief Justice granted a timely application by the House of Representatives to extend the time for filing this petition for writ of certiorari to and including August 7, 1982. This petition is being filed within that extended time period.

The House of Representatives invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set forth in the appendix now before this Court in these related cases, the following constitutional and statutory provisions, or relevant portions thereof, are deemed pertinent:

1. Article I, Section 1, of the Constitution. App. 222a.
2. Article I, Section 7, Clauses 2 and 3, of the Constitution. App. 222a–223a.
3. Article I, Section 8, Clauses 3 and 18, of the Constitution. App 223a.
4. Article II, Section 1, of the Constitution. App. 223a.
5. Article II, Section 3, of the Constitution. App. 224a.
6. Article III, Section 1, of the Constitution. App. 224a.
7. Section 201 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3341. App. 224a–225a.
8. Section 202 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342. App. 225a–227a.

9. Section 206(d) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3346(d). App. 227a–228a.

10. Section 506(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3416(a). App. 228(a)–231a.

STATEMENT

As the court below observed, this is a controversy that "represents a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. For sixty years "there has been 'a long tug of war between the Executive and Legislative Branches of the Federal Government' over the constitutionality of legislative review devices." App. 48a.

But the story of this particular case is how the Judicial Branch sought to resolve this controversy in favor of the Executive Branch in a proceeding (a) instituted by private parties said to have "an important stake in the resolution of this [inter-branch] issue," App. 47a, and (b) where the Legislative and Executive Branches appeared not as parties but as *amici curiae*. And the story is one that concludes with a judicial decree that the administrative rule in question "shall take effect," App. 104a, absent further agency action, despite the absence of any statutory authorization for such a decree.

A. THE STATUTORY SCHEME

The story begins with the enactment of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301–3342, duly signed into law by President Carter. Title II of that Act requires the Federal Energy Regulatory Commission ("FERC") to implement a so-called "incremental pricing" program under which certain gas acquisition costs incurred by interstate pipelines are collected only from certain industrial users, rather than from residential, commercial and other high-priority users.

The Act provides that the incremental pricing program will be implemented in two phases, Phase I and Phase II. In Phase I, embodied in Section 201, 15 U.S.C. § 3341, FERC is directed to "prescribe and make effective" a rule respecting the costs of natural gas only as to "industrial boiler fuel facilities" as defined by FERC; there is no provision for legislative review of

a Phase I rule.[3] But in Phase II, embodied in Section 202, 15 U.S.C. § 3342, FERC is directed to expand the incremental pricing program to "any industrial facility which is within a category defined by the Commission" and not otherwise exempt. FERC is directed by Section 202(a)(1) to make the expansion no later than 18 months after November 9, 1978, and to do so in the form of "an amendment to the rule required" under Phase I. It is that amendment that constitutes the so-called Phase II rule, which is the center of this litigation.

Unlike the Phase I rule, the Phase II rule does not become effective when issued by FERC. Section 202(a)(2) provides that the Phase II amendment or rule "shall take effect only as provided under subsection (c) of this section." And Section 202(c), the subsection that the court below held unconstitutional, plainly provides that the amending rule "shall take effect" only after a copy of the rule has been submitted to each House of Congress and a specified 30-day period of continuous session of Congress has expired thereafter—"unless during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval."

Section 202(c)(2) further provides that if either House adopts a resolution of disapproval with respect to the Phase II amending rule, FERC may thereafter submit to each House another rule, to take effect only after the same legislative review procedures have been satisfied.

It is noteworthy that no part of Section 202 refers to the Phase II rule to be prescribed by FERC as a "final rule" or as anything other than a "rule" that becomes effective "only as provided under subsection (c)," the legislative review subsection.

B. FERC'S PROPOSED PHASE II AMENDMENT

On May 6, 1980, after holding hearings and receiving comments, FERC issued its proposed Phase II rule amendment, what it called "Final Rule, Subject to Congressional Review." App. 123a. This so-called "final rule" was embraced in FERC's Order No. 80. In the official summary of the rule-proposal, FERC stated (App. 123a):

[3] FERC promulgated Phase I regulations in 1979 in Order No. 49.

The rule is subject to Congressional review and will not become effective if disapproved by either House of Congress. If not disapproved, the rule will expand the scope of the incremental pricing program to all industrial end-users not exempt under the NGPA, and provide that those users of natural gas other than as boiler fuel be permanently subject to incremental pricing surcharges up to the price of high-sulfur No. 6 fuel oil.

Effective date: Such date as represents the ninety-first day following expiration of 30-day Congressional review period if not disapproved by either House.

FERC further made clear at the outset of its rule-proposal (App. 125a) that

> The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. Instead, the Commission is instructed to bring its technical expertise to bear on the design of a workable Phase II rule that can best advance the purposes set by Congress. It is up to the Congress to decide whether this Phase II [rule] submitted meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate.
>
> By virtue of the very [Congressional] review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful choice if the Commission were to offer no rule, or a very narrow rule, for its review. The Congress has reserved to itself the fundamental judgment as to whether an expansion of incremental pricing is consistent with current national priorities.
>
> The Commssion believes that this Phase II rule presents a meaningful choice to the Congress.

C. HOUSE DISAPPROVAL OF THE FERC PROPOSAL

On the same day FERC issued its proposal, May 6, 1980, the rule-proposal was transmitted to Congress as required by

Section 202(c)(1). A resolution of disapproval was quickly introduced in the House (H. Res. 655) and referred to the House Committee on Interstate and Foreign Commerce. On May 12, 1980, the Committee prepared a report entitled "Incremental Pricing of Natural Gas," H. Rep. No. 96–938, 96th Cong., 2d Sess. (1980), reproduced at App. 107a–121a. In that report, the Committee recommended that the resolution of disapproval "do pass." Among the significant comments in the report are the following:

> [1] The Natural Gas Policy Act of 1978 (NGPA) requires the Federal Energy Regulatory Commission to develop and submit to Congress, by May 9, 1980, a proposal for incrementally pricing natural gas sold to industrial nonboiler fuel facilities identified by the Commission. Incremental pricing under the NGPA mandates the allocaton of a portion of the acquisition costs of natural gas to industrial boiler fuel users and requires the Commission, subject to Congressional review, to extend incremental pricing to such other nonboiler industrial users as it deems appropriate. . . . The Commission's proposal will become effective unless it is disapproved by either House of Congress within 30 days (of continuous session) of its submission by the Commision. [App. 107a].
>
> [2] The committee finds that acknowledged uncertainty, current circumstances, and problems raised by the Commission's alternative fuel price mechanism preclude implementation of this rule. [App. 119a].
>
> [3] Accordingly, the committee finds that current uncertainties with respect to Phase II of incremental pricing must be substantially reduced before it would consider implementation of a Phase II rule. The committee accepts the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish market ordering or price sheltering. Current market conditions do not support the need for an expansion of incremental pricing beyond phase I. [App. 119a–120a].
>
> [4] House Resolution 655 does not change any existing law. [App. 120a].

The resolution of disapproval went to the floor of the House on May 20, 1980, where it was adopted 369 to 34. *See* 126 Cong. Rec. H3839–3855. The floor discussion reflected many of the same concerns raised by the Committee. For the most part, the supporters of the resolution believed that FERC's proposal was in keeping with the mandate of Congress, but that the policy considerations of Phase II had changed since the passage of the Act. *See, e.g.*, H3841, col. 3. Others believed that FERC had not carried out the legislative intent with respect to providing protection for consumers. *See* H3847, H3854. As thus passed, House Resolution 655 reads (App. 222a):

> *Resolved*, That the House of Representatives does not approve the proposed rule under section 202 of the Natural Gas Policy Act of 1978 (relating to incremental pricing of natural gas) a copy of which was transmitted to the Congress on May 6, 1980.

D. REHEARING PROCEEDINGS BEFORE FERC

On June 5, 1980, CECA filed its first application for rehearing of Order No. 80, containing FERC's disapproved rule-proposal. CECA requested FERC to delete the Congressional review language wherever it appeared in Order No. 80, "thereby making the rules effective in accordance with the remaining terms thereof." C.A.App. 1. The basis for the application was said to be that "the Veto Provision, the statute on which it is based, 15 U.S.C. § 3342(c), and the Resolution of Disapproval passed by the House of Representatives on May 20, 1980 (H. Res. 655) are unconstitutional." *Id.*

On August 1, 1980, FERC by order denied CECA's rehearing application. App. 196a–203a. In refusing to pass upon the constitutionality of the Congressional review provisions of the Act, FERC adhered to the view "that sound administrative practice requires the presumption of constitutional validity of statutes entrusted to this Commission for implementation." App. 198a.

In the same August 1 order, FERC also exercised "its authority under sections 201 and 202 to amend the rule under section 201 to revoke the [Phase II] amendments made by Order No. 80." App. 201a. It revoked Order No. 80 even on the

assumption that, if the Congressional review procedure of Section 202(c) were found invalid, the Phase II rule-proposal could take effect. It did so for a variety of reasons: (a) FERC itself, in submitting the proposal to Congress, had made no evaluation of the social and economic goals of Phase II, believing that Congress had that responsibility; (b) Order No. 80 thus was not "the product of reasoned decision-making and the Commission is neither authorized nor required to place it into effect" (App. 199a); (c) even were FERC to make an independent social and economic evalaution, "we believe as an initial matter that we might well have very serious reservations as to the wisdom of making the Phase II rule effective" (App. 199a–200a); (d) the proposed rule does not "appear to be capable of carrying out the market ordering function of incremental pricing . . . [and] might be an imperfect instrument for sheltering high-priority users from the economic impacts of rapidly increasing natural gas prices" (App. 200a). Finally, FERC determined that a variety of imponderables, "and other major social and economic issues raised by Order No. 80, simply must be addressed, and a reasoned judgment reached upon them, before the rule takes effect." App. 201a.

CECA then sought rehearing of that portion of FERC's August 1 order that revoked Order No. 80. C.A.App. 16. In this second rehearing application, CECA claimed that FERC lacked power to revoke a Phase II rule inasmuch as it was under a statutory mandate to issue such a rule. And it was asserted that the revocation was not in accordance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

On October 2, 1980, FERC issued an order denying rehearing on the revocation issue. App. 204a–207a.

E. CECA'S PETITIONS FOR JUDICIAL REVIEW

The CECA organizations sought judicial review in the court below of the two FERC orders, dated August 1 and October 2, that had denied CECA's two petitions for rehearing. These were deemed to be "final orders" within the meaning of Section 506(a)(4) of the Natural Gas Policy Act, 15 U.S.C. § 3416

(a)(4), which authorizes judicial review at the instance of any person "who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding." Separate petitions for review having been filed as to each denial of rehearing, the petitions (Nos. 80–2184, 80–2312) were consolidated by court order on November 7, 1980.

The CECA organizations claim to represent many individual high-priority consumers of natural gas.[4] They allege that they were aggrieved by the two FERC orders denying rehearing, inasmuch as the effect was to preclude Phase II "incremental pricing rules from going into effect." C.A.App. 1. Those rules, had they become effective, "would have shifted some of the costs of natural gas to industrial users and away from consumers." And, without such rules, "the cost of natural gas to the consumers who are members of the organizations comprising petitioner CECA will be increased thereby." *Id.*

While CECA's ensuing brief on the merits in the court below briefly described the revocation matter in its statement of the case (pp. 19–20), the sole Question Presented was "Is it constitutional for one House of Congress to veto a rule issued by an agency of the executive branch of the federal government?" Brief, p. 2. Or, as CECA asserted in the conclusion of its brief (p. 63), "The crucial question which this Court must answer is whether the Framers intended to permit a single House of Congress the virtually unlimited authority to override a duly enacted statute through the mechanism of vetoing the regulations which are needed to carry it out."

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[4] The three CECA organizations have described themselves as non-profit organizations composed variously of individual and organizational members. The Consumer Energy Council in particular has described itself as "a broad-based coalition of consumer, labor, farm, public power, rural electric cooperative, urban, senior citizen, and low income organizations established to represent the consumer voice in national energy policy, including pricing policies for natural gas." C.A.App. 1.

Many of the individual members and contributors to the three CECA organizations are said to be high-priority consumers of natural gas. In addition, Public Citizen "is also the owner of a building located at 215 Pennsylvania Avenue, S.E., Washington, D.C., which is heated, in part, by natural gas." C.A.App. 2.

The CECA brief then proceeded to present the stock arguments that the legislative review device, as embodied here in Section 202(c) of the Natural Gas Policy Act, exceeds the legislative powers of Congress, violates the general separation of powers doctrine, and deprives the President of the opportunity to exercise his veto power under Article I, Section 7, of the Constitution.[5] No claim was made, however, that Section 202(c) violates any procedural or other constitutional right of CECA or members thereof. The sole constitutional claim was that the constitutional powers of the Executive, and to some extent those of the Judiciary, have been breached by Congress.

Not surprisingly, CECA's constitutional claim was such as to attract the full support of the Executive Branch. Appearing *sub nom.* "United States," the Executive Branch filed a brief *amicus curiae* "to present its views on this important constitutional issue." Brief, pp. 2–3. The Executive Branch expressed its total agreement with CECA's constitutional positions, adding only that Section 202(c) is severable from the other provisions of the Act. The Executive Branch's brief also announced, p. 3, that "we have transmitted a report to each House of Congress providing notification that we will contest the constitutionality of a statute. . . . We would welcome the participation in this case of the Senate and the House of Representatives as *amici curiae*, in order to provide this Court with full argument on the issue of the constitutionality of Section [202(c)]."

The Senate and House responded to this notification that the Executive Branch desired a constitutional confrontation with the Legislative Branch by filing a joint brief *amici curiae*. The two Houses sought to advise the court that Section 202(c) represented a proper exercise of the broad authority of Congress under the Necessary and Proper Clause to provide for a limited kind of delegation of quasi-legislative functions, and that no other provision in the Constitution precluded this

[5] The constitutional arguments advanced on behalf of CECA are identical to those advanced on behalf of Chadha in the *Chadha* cases now pending before this Court for reargument, Nos. 80-1832, 80-2170, 80-2171. Counsel for CECA also represents Chadha.

choice of means of implementing the commerce power. In addition, the two Houses argued that Section 202(c) is not severable from the remainder of the statute, and that FERC's revocation of the Phase II proposal made the review proceedings moot. By leave of court, the two Houses also filed a motion to dismiss on the ground that the case should have been brought in a district court, not in the appellate court under Section 506(a)(4).

In the meantime, the sole party respondent before the court below—FERC—filed a brief taking no position on the constitutionality of Section 202(c). FERC argued that the constitutional issue need not be reached since (a) the Phase II order was but a proposal to Congress, and hence could not stand absent a Congressional mandate of some sort authorizing that it be made effective; (b) FERC in any event had authority to revoke the proposal; and (c) Section 202(c) is inseverable from the remaining Phase II subsections of Section 202.

Various groups of gas utility and related corporations intervened as respondents, basically in support of FERC's statutory positions. Several intervenors also supported the constitutionality of Section 202(c).

CECA addressed the revocation, severability and jurisdictional issues for the first time in its reply brief.

F. THE RULING BELOW

In a wide-ranging 104-page opinion, the court below held "that the revocation order was invalid, that section 202(c) is unconstitutional, and that the Phase II rule should become effective absent further Commission action to postpone or amend it." App. 16a. It rejected every jurisdictional, prudential and constitutional argument put forth by the two Houses in their *amici* capacity, as well as several arguments advanced by proponents of the legislative review device that the two Houses did not see fit to advance.[6]

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[6] The court spent three pages, App. 96a–98a, rebutting certain arguments ascribed to former Senator Javits in a 1977 law review article. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U L. Rev. 455 (1977).

See also App. 52a–54a, n. 127, where the court spends a long footnote critiquing a law review article by Professor Van Alstyne of Duke University School of Law.

The court dismissed any thought that a political question might be present in the case. App. 43a–49a. And it quickly found that the Necessary and Proper Clause "fails to advance the argument on behalf of the one-house veto." App. 52a. The main thesis of the opinion was that Section 202(c) is unconstitutional in that (a) it violates the Presentment Clauses of Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one House of Congress, and (b) it contravenes the separation of powers doctrine implicit in Articles I, II, and II because it authorizes the Congress to share powers properly exercisable only by the other two branches.

Having thus proceeded to invalidate Section 202(c), the court concluded by decreeing that FERC's Phase II proposal "shall take effect," App. 104a, absent "further Commission action to postpone or amend it," App. 16a. The court cited no statutory or other authorization for a judicial declaration of the effectiveness of a Phase II proposal made by FERC, particularly one that FERC itself believes to be unwise and ineffective.

G. THE POST-JUDGMENT INTERVENTIONS

The court below did in fact resolve "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. But since those political branches participated in the proceedings only as *amici curae*, they found themselves in a quandary. They had no standing to take the initiative before this Court to pursue or protect their respective interests. The House and Senate in particular had no assurance that any of the parties opposing CECA in the proceedings below would appeal the constitutional issue, let alone adequately represent the critical concerns of the two Houses.

For those reasons, the House and the Senate, as well as the Executive Branch, sought and obtained leave of court to intervene after judgment. The House and Senate are now in this Court as petitioners. The Executive Branch is here as a party respondent and appellee.

REASONS FOR GRANTING THE WRIT

1. BY UNDULY RESTRICTING THE "NECESSARY AND PROPER" LEGISLATIVE AUTHORITY OF THE CONGRESS, THE DECISION BELOW CREATES "FAR-REACHING EFFECTS ON THE OPERATION OF THE NATIONAL GOVERNMENT"

The two Houses of Congress come to this Court, for the second time within the recent past,[7] to protest a lower court decision that restructures and deprecates the "necessary and proper" legislative powers of Congress.

The decision below touches a matter of profound concern to the Congress and the National Government, as well as to the entire Nation. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819), the ability of Congress to select those means deemed appropriate to the execution of the great powers of government is a matter "on which the welfare of a nation essentially depends." And if that capacity of Congress, embodied in the affirmative grant of legislative power by the Necessary and Proper Clause (Article I, Section 8, Clause 18), be unduly retracted, then the Constitution may indeed become but "a splendid bauble." *Id.*, at 421.

The court below conceded that its decision creates "far-reaching effects on the operation of the National Government." The House submits that those effects are so manifold, so ill-conceived, so destructive of the constitutional design envisioned in *McCulloch* v. *Maryland*, that the reasons for plenary review of the decision below become compelling. In capsule form, the ill effects that must be examined by this Court are:

First. The court below, in addressing the constitutionality of Section 202(c) of the Natural Gas Policy Act, ignores the precepts that all presumptions "are in favor of constitutionality" and that "before a court is justified in holding that the

[7] On June 22, 1981, the House and Senate filed petitions for certiorari to review the ruling of the Ninth Circuit, *Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), holding unconstitutional the legislative review provisions of Section 244(c)(2) of the Immigration and Nationality Act. Nos. 80-2170, 80-2171. Review was granted, and oral argument was had on February 22, 1982, along with the INS appeal in the case, No. 80-1832. On July 2, 1982, the Court restored all three cases to the calendar for reargument.

legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear." *Fairbank* v. *United States*, 181 U.S. 283, 288 (1901).

Here, the "excess or conflict" is anything but clear. More importantly, the failure to accord presumptive validity to Section 202(c) exacerbates the court's refusal (App. 52a) to give serious consideration to Congress' theory of the constitutionality of Section 202(c). The theory is that the Necessary and Proper Clause confers legislative power on Congress to pass laws that delegate and/or retain certain quasi-legislative functions. That theory is a modern manifestation of the principles of *McCulloch* v. *Maryland;* and it is the theory used by the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028, 1057–1071 (Ct. Cls. 1977), *cert. denied*, 434 U.S. 1009 (1978), to validate the legislative review device in the federal Salary Act. The decision below thus directly conflicts with *Atkins* in terms of the use of the "necessary and proper analytical approach to the legislative review device.

Second. The *McCulloch* decision makes clear that the Necessary and Proper Clause is something more than a benign clause, with no role to play in constitutional analysis other than to bring into focus what the court below calls "other constitutional infirmities" (App. 52a). *McCulloch*, as the Court of Claims emphasizes in *Atkins*, establishes that the Clause is an affirmative and independent grant of legislative power, "an additional power, not a restriction on those already granted." 17 U.S. (4 Wheat.) at 420.

In the context of assessing the validity of the legislative review device, the *McCulloch* analytical model requires a court first to ask whether the affirmative thrust of the Clause permits Congress, as part of a duly enacted statute, to retain and exercise some of the quasi-legislative functions that are otherwise delegable to an administrative agency. If the answer is affirmative, then the question is whether any other provision of the Constitution "imperiously" (*Id.*, at 408) prohibits or withholds such "necessary and proper" choice of means. And where the alleged infirmity is an invasion of a function constitutionally

assigned to another branch, there must be a weighing process to determine if the invasion "is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

Third. The court below has significantly recast the infrastructure of legislative power vested in Congress. It has done so in several ways:

(a) It has read Sections 1 and 7 of Article I in such way as to confine the legislative power of Congress to the enactment of plenary legislation, subject to presidential veto.

(b) It has thereby seriously impaired the legislative power implicit in the Necessary and Proper Clause to provide by statute for various ways of performing quasi-legislative functions within that statute.

(c) It has thrown into confusion the doctrine that, by virtue of the Necessary and Proper Clause, Congress can delegate to governmental departments and agencies "the exercise of quasi-legislative authority . . . subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). For if Congress is constitutionally forbidden to engage in the quasi-legislative function of approving or disapproving administrative lawmaking without enacting a new plenary statute each time it so acts, how can administrative agencies be delegated that same function without being subject to the same plenary legislation requirements?

(d) It has failed to recognize the historic distinction between plenary legislation and quasi-legislation. Until now, only plenary legislation has been thought subject to the bicameral processes of Article I, Section 7, while quasi-legislation has been the peculiar concern of the discretionary judgments of Congress in exercise of its "necessary and proper" legislative powers.

(e) The ultimate reorganization attempted by the court below is to read the quasi-legislative aspects of the Necessary and Proper Clause as being overruled by, or inconsistent with, the Presentment Clauses, as well as the separation doctrine. But as was said long ago in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821), it is the duty of a court "so to construe the

constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not permit their seeming repugnancy to destroy each other." The court below made no effort to give effect to the Necessary and Proper Clause, or to reconcile it with the Presentment Clauses or the separation doctrine.

Fourth. In approaching the constitutional problem, the court below repeatedly asserts and assumes that Congress sought to impose legislative review and a "one-House veto" on an otherwise "final" and "effective" order of FERC. See App. 33a, n. 74; 74a–76a. The House emphatically rejects that interpretation of Section 202(c). That section, as well as FERC's Order No. 80 and the House resolution of disapproval, are replete with references to Congressional review of a "proposed rule"—a proposed rule that "shall take effect" only if neither House adopts "a resolution of disapproval" within a specified period after submission. Congress, in other words, has not delegated to FERC the quasi-legislative authority to make effective a Phase II rule. It has only asked FERC to assist the Congress by formulating a proposed rule for Congress to consider. And at no time has FERC acted as though it had authority to finalize its Order No. 80.

Fifth. The court below, in taking away from Congress much of its "necessary and proper" quasi-legislative power, has transferred that power to the Executive Branch. Cast by the court in constitutional concrete, that transfer wreaks havoc with the separation of powers doctrine. By destroying the healthy and growing cooperation between the Legislative and Executive Branches, the court returns to the "archaic view of the separation of powers as requiring three airtight departments of government." *Nixon*, 433 U.S. at 425. In the court's view, Congress is now restricted to enacting plenary legislation, while the Executive has exclusive power to execute plenary statutes as he sees fit. Congress can no longer put conditions or limitations on Executive exercise of delegated quasi-legislative power, save by passing a new plenary statute.

Thus the District of Columbia Circuit succeeds in diluting the Necessary and Proper Clause to the point where it will be

difficult for the Clause's quasi-legislative grant to "be adapted to the various *crises* of human affairs." *McCulloch*, at 415. The decision below serves "to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *Id.*, at 415–416.

The effect of the constitutional principles announced below is to preclude Congress, in implementing the complex economic and social policies of the Natural Gas Policy Act, from instructing FERC "to bring its technical expertise to bear on the design of a workable Phase II rule that can best advance the purposes set by Congress." See App. 125a. The court states that if Congress doesn't like that constitutional block to granting such limited quasi-legislative power to FERC, "it may by statute take it back or may in the future enact more specific delegations." App. 98a. That remark seems to make no sense, governmentally or constitutionally. Why should Congress be forced to legislate on difficult economic and social matters with its "necessary and proper" hands tied behind its back? And what does the Executive hope to gain by corralling all quasi-legislative rulemaking functions within the vested Executive power?

2. THE DECISION BELOW POSES IMPORTANT QUESTIONS AS TO THE SEVERABILITY OF SECTION 202(c) AND THE JUDICIAL POWER TO MANDATE THAT A PROPOSED PHASE II RULE BE MADE EFFECTIVE CONTRARY TO THE STATUTORY SCHEME

The court below misunderstood the critical role that Section 202(c)—the subsection found to be unconstitutional—plays in making a Phase II rule-proposal effective. Section 202(a)(1) authorizes FERC to "prescribe" a Rule II amendment, while Section 202(a)(2) says that such an amendment "shall take effect only as provided" in Section 202(c). And Section 202(c)(1) allows the amendment submitted by FERC to "take effect" in the prescribed 30-day period "unless during such 30 day period . . . either House of the Congress adopts a resolution of disapproval." If such disapproval occurs, as happened here, FERC may not propose another Phase II rule for at least six months (Section 202(c)(2)(B)), and loses all power to

submit a proposed rule after two years (Section 202 (c)(2)(B)).

Several problems emerge from the ruling below severing the whole of Section 202(c), invalidating it, and then decreeing that FERC's Phase II rule-proposal be made effective.

First. There is no severability clause in the Natural Gas Policy Act. How, then, can a court sever and invalidate the sole statutory mechanism for making a Phase II rule-proposal effective? The court below answers that it can sever if it finds that Congress "would have intended" that a Phase II rule be made effective even without the legislative review mechanism of Section 202(c). See App. 21a–30a; *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968); *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

But the cited cases in this Court make clear the inadequacy of that answer. *Buckley*, *Jackson* and *Champlin* all state that reliance on legislative intent to determine severability is appropriate only "if what is left [after severance] is fully operative as a law." In this instance, "what is left" after severing Section 202(c) is inoperative; a Phase II rule amendment authorized by Section 202(a) (1) and (2) can take effect only in accordance with the severed Section 202(c).

Thus the severability problem here is traceable to the lower court's desire to read finality into an administrative order or rule, a finality that the unsevered remainder of the statute will not support. It is the same kind of severability problem that plagued the Ninth Circuit in *Chadha*, now scheduled for reargument before this Court. The severability issue common to both cases can be considered together.

Second. As the Ninth Circuit did in *Chadha* with respect to decreeing cancellation of an INS deportation order, the court below decreed finality to a Phase II rule-proposal. Both courts, having severed and invalidated the only statutory bases for such finalization, can cite no authority for their judicial decrees other than their own fiat.

Such judicial action, unauthorized by statute, amounts to judicial legislation in contravention of the separation of pow-

ers. "Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist." *United States* v. *Union Pacific R. Co.*, 91 U.S. 72, 85 (1875). Certainly, courts have no greater power to decree relief where the omission stems from severance and invalidation of the sole statutory basis for relief. If a court can find no basis for relief in "what is left" in a statute after severance, that should end the matter.

This judicial excess deserves plenary review and correction by this Court. The Congress simply does not want Order No ,80 made effective. FERC does not want it made effective. And nothing in the opinion below purports to assess the economic and social policies that alone can justify putting a Phase II rule into effect.

3. THE DECISION BELOW RAISES IMPORTANT "CASE OR CONTROVERSY" PROBLEMS INVOLVING CONSTITUTIONAL ATTACKS ON THE LEGISLATIVE REVIEW DEVICE

Like the *Chadha* litigation now before the Court, the instant judicial review proceeding poses critical justiciability problems in the context of private party assaults on the constitutionality of the legislative review device in Section 202(c).

First. Do the private parties, the respondent CECA organizations, have standing to institute in federal co[illegible]an inter-Branch controversy over the legislative review device?[6] Can they show, in other words, that they personally "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)?

The answers to those questions are not easy. CECA has not alleged that the proposed Phase II rule created any legal right, "the invasion of which creates standing," *Linda R.S.* v.

[6] While this question is not addressed in the opinion below, the question was raised by Circuit Judge Edwards at oral argument. The court does state, without elaboration, that the private parties have "an important stake in the resolution of this [constitutional] issue." App. 47a.

Richard D., 410 U.S. 614, 617, n. 3 (1973). CECA seems to have suffered no injury other than the disappointment any prospective beneficiary of a proposal suffers when the proposal is not enacted into law. Even that disappointment rises no higher "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College* v. *Americans United*, 102 S.Ct. 752, 765, 70 L.Ed. 2d 700, 718 (1982). Moreover, CECA's disappointment is not the result of "the putatively illegal conduct" of the sole defending party, FERC. CECA's only challenge is to "the putatively illegal conduct" of the Legislative Branch, a factor which leads to a question whether CECA is within "the zone of interests" to be protected by the Presentment Clauses or the separation of powers doctrine. Obviously, these hard questions must be addressed.

Second. The court below correctly observes that this case involves "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. The observation brings into focus the incongruity of resolving that disagreement when the political branches are before the court only in an *amicus* posture.

It is a basic Article III premise that no federal court can pronounce a statute unconstitutional "except as it is called upon to adjudge the legal rights of litigants in actual controversy." *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). That means that the controversy must involve the litigants or the parties to the case. But those who may appear as *amicus curiae* cannot supply the necessary adverseness upon which "the court so largely depends for illumination of difficult constittuional questions." *Id.* To adjudicate controversies between *amici* implicates the advisory opinion doctrine. The court simply did not have before it the actual parties to the controversy.

A variant of this problem is present in the *Chadha* case. There the Ninth Circuit purported to resolve an inter-Branch controversy with only one Branch before the court as a party; the two Houses of Congress appeared only as *amici*. Here, neither Branch is a party. And in both cases the two Houses

find their legislative powers being adjudicated without being allowed to participate fully as a party and to introduce whatever evidence that might support their constitutional arguments.

The House of Representatives protests this judicial permissiveness that allows the constitutional powers of a coordinate Branch to be assessed and resolved on no firmer Article III basis than the appearance of that Branch as *amicus*.*

Third. The court below, like the Ninth Circuit in *Chadha*, rejected the political question doctrine on the ground that a judicial resolution is "appropriate" since there is "a clear disagreement between the political branches as to the meaning of the Constitution." App. 49a. But the court assumes that the disagreement relates only to the Presentment Clauses and the general separation of powers doctrine. Not so. Properly understood, this case involves a Congressional determination of what is "necessary" and "proper," by way of providing a legislative review mechanism, to implement the vested power of Congress over commerce in natural gas.

The determination of whether a legislative review provision is "necessary and proper" to that end is a matter textually committed to the Legislative Branch. *McCulloch* v. *Maryland*, 4 Wheat. at 423, made clear that for a court to inquire into the degree of necessity or propriety "would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." Recognition that the Necessary and Proper Clause is in essence a political/legislative proposition serves to strengthen its consistency with the Presentment Clauses and the general separation doctrine.

Fourth. Important problems of mootness are raised by the fact that the proposed Phase II rule has never achieved legal effectiveness, and by the fact that FERC took action to revoke that proposal. The court below sought to avoid mootness by rul-

* After the court below rendered its opinion and judgment, the House, the Senate and the Executive Branch obtained leave from the court to intervene in the proceeding. The sole purpose was to allow the two Branches to proceed further in this Court as parties, rather than as *amici*. Such intervention, of course, had no effect on their status as *amici* in the proceeding before the District of Columbia Circuit.

ing that the proposal was really final since the administrative rulemaking process "was at that point complete," App. 33a, n. 74, and that the revocation by FERC did not comply with the APA hearing and comment requirements, App. 31a–36a. And the court added that the "veto of the Phase II rule effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect." App. 74a.

But none of these judicial explanations of the finality of FERC's proposal answers the provision of Section 202(a)(2) that a Phase II proposal "shall take effect" only as provided in Section 202(c). The enigma remains. How can a live controversy be generated over an administrative proposal that, as a matter of law, never became effective?

Were this Court to accept any of the foregoing considerations, it would be unnecessary to enter the constitutional thicket surrounding the legislative veto device.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 1982.

○

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1]In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

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UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-209

UNITED STATES HOUSE OF REPRESENTATIVES,
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CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC: [3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

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[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

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[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

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[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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